CHANTELLA HONEYBEE SARGON

v.

ANANDA DHARMALINGAM

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: W-02-500-2003]
12 OCTOBER 2004

FAMILY LAW: *Children - Custody - Appeal against order of custody - Facts, finding of - Whether trial judge erred in finding appellant unfit to care for her children - Whether appellate court should intervene - Admission of further evidence - Whether a miscarriage of justice to permit further evidence - Whether custody appeals should be treated differently from civil appeals*

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Facts, finding of - Custody order - Whether trial judge erred in her findings - Whether appellate court should intervene - Admission of further evidence - Whether a miscarriage of justice to permit further evidence - Whether custody appeals should be treated differently from civil appeals*

CIVIL PROCEDURE: *Trial - Further evidence - Admission of further evidence - Whether a miscarriage of justice - Whether it would occasion an injustice to respondent to fight a new case altogether*

This was the appellant's appeal against the order of the High Court granting custody of the children of the marriage to the respondent. The appellant argued that the learned judge had not judicially appreciated the evidence and had misdirected herself when she found the appellant psychologically unfit to look after the children. At the commencement of the appeal, the appellant moved for the admission of further evidence. The appellant also submitted that a custody appeal should be treated differently from other civil appeals.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] Appeals in custody cases are not subject to special rules. The appellate court should only interfere when it is satisfied that the court of first instance has exceeded the generous ambit within which a reasonable disagreement is possible or has reached a decision which is so plainly wrong that it must have erred in the exercise of its discretion. A custody appeal was no different from other appeals (*G v.G* [1985] FLR 894). (p 320 d-g)

[2] The learned judge had undertaken and fulfilled the responsibility entrusted to her as the primary finder of fact. She had made an assessment of the witnesses and had compared evidence. The case was fought on common ground where both sides relied on evidence emerging from cross-examination of experts. It would be a miscarriage of justice to permit further evidence as it would have occasioned an injustice to the respondent. He would have had to fight a new case altogether upon which the appellate court would have singularly lacked the views of the trial judge. (pp 320 g-h & 322 b-c)

[3] Since the appellate court was unable to detect any appealable error, it must defer to the view of the learned judge on her perception of the evidence before her. The court was unable to exercise its appellate powers to intervene. (p 321 g)

[Appeal dismissed with no order as to costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap perintah Mahkamah Tinggi kerana memberikan hak jagaan anak-anak dari perkahwinannya kepada responden. Menurut perayu, yang arif hakim telah gagal menilai keterangan yang ada dengan penuh kehakiman dan telah menyalah-arahkan dirinya apabila mendapati bahawa perayu tidak layak untuk menjaga anak-anaknya disebabkan oleh masaalah psikologi. Pada permulaan rayuan, perayu memohon untuk mengemukakan keterangan-keterangan lanjut. Perayu juga menghujah bahawa rayuan untuk penjagaan harus diberi layanan berbeza berbanding dengan rayuan-rayuan lain.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Rayuan-rayuan dalam kes-kes penjagaan tidak harus tertakluk kepada peraturan-peraturan khas. Mahkamah rayuan hanya boleh campur tangan jika berpuashati bahawa mahkamah di bawah telah melangkahi ruang luas yang wujud untuk perbezaan pendapat atau telah mencapai keputusan yang amat jelas salahnya sehingga menjadikan pelaksanaan budi bicaranya silap. Suatu rayuan untuk hak penjagaan tidak berbeza dari rayuan-rayuan lain (*G v. G* [1985] FLR 894).

[2] Yang arif hakim telah melaksanakan tugas yang dipertanggungkan ke atasnya sebagai pencari utama fakta. Beliau telah membuat penilaian akan saksi-saksi dan telah membanding keterangan-keterangan. Kes juga telah dilawan di atas padang yang sama di mana kedua pihak bergantung kepada

keterangan yang terbit dari pemeriksaan balas pakar-pakar. Membenarkan keterangan lanjut akan mengakibatkan salah laksana keadilan kerana ia akan menyebabkan ketidakadilan kepada responden. Beliau terpaksa menentang satu kes lain yang berbeza sama sekali, berkaitan mana mahkamah rayuan tidak akan mendapat manfaat pandangan hakim bicara.

[3] Mahkamah rayuan tidak dapat melihat apa-apa kesilapan yang boleh dirayu dan kerana itu harus merujuk kepada persepsi yang arif hakim terhadap keterangan yang ada di hadapannya. Mahkamah tidak berupaya untuk melaksanakan kuasa rayuannya untuk campur tangan.

[Rayuan ditolak dengan perintah mengenai kos.]

Case(s) referred to:
Clarke v. Edinburgh Tramways Co [1919] SC (HL) 35 ***(refd)***
G v. G [1985] FLR 894 ***(refd)***

For the appellant - Chew Swee Yoke (Walter Pereira with her); M/s Kamarudin & Partners
For the respondent - Foo Yet Ngo (Faridah Abdullah with her); M/s YN Foo & Partners

[Appeal from High Court, Kuala Lumpur; No: S8-33-837-2000]

Reported by Suhainah Wahiduddin

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

The appeal is directed against the order of the learned judge in the court below granting custody of the children of the marriage to the respondent. A sustained argument was addressed by counsel for the appellant that the learned judge who heard the application had misdirected herself. It was also argued that the learned judge had not judicially appreciated the evidence and we were invited to set aside the order made in the court below.

In opening the appeal, counsel for the appellant submitted that this being a custody appeal, it ought to be treated differently from other civil appeals. With respect, we must reject this submission. In the case of *G v. G* [1985] FLR 894 the House of Lords held that a custody appeal was no different from other appeals. Suffice that we quote from the headnote at p. 894 of the report:

a Held – (1) Appeals in custody cases, or in other cases concerning the welfare of children, were not subject to special rules. Even if the appellate court would itself have preferred a different conclusion, it must leave the decision of first instance undisturbed unless it could say that decision was wrong. The limited role of the appellate court in custody cases was not that appeals in such cases were subject to any special rules, but that there were often two or more possible b decisions any one of which the court of first instance might reach without being held to be wrong. The appellate court should only interfere when it was satisfied that the court of first instance had not merely reached a decision with which the appellate court might disagree, but had exceeded the generous ambit within which a reasonable disagreement was possible and had reached a decision which c was so plainly wrong that it must erred in the exercise of its discretion. Where the decision of the court of first instance, not being dependent on an assessment of witnesses, was vitiated by an error in the balancing exercise, being an erroneous weighing of the relevant factors, the appellate court could interfere.

We have considered the arguments advanced before us on the appellant's behalf d but we feel compelled to reject them. It appears from the learned judge's judgment that she undertook and fulfilled the responsibility entrusted on her as the primary finder of fact. At p. 21 of her judgment, she says this:

After comparing their evidence as against the evidence of the three (3) senior psychiatrists, (two of whom had seen the Respondent Wife over a period of e time) called by the Petitioner Husband, in particular the court witness, Dr. Chin, I am satisfied that Dr. Chin's evidence remains the most accurate and reliable diagnosis that the Respondent suffers the mental illness of major depression (with or without melancholia). It is also in evidence that even without melancholia the illness of major depression is a severe form of depression (as opposed to minor depression) and should not be treated lightly for if left f untreated, it can result in serious consequences. In the circumstances, I am of the strong view that the Respondent Wife is not a fit and proper person to have custody of the children more so when they are children with special needs.

The foregoing passage makes clear that the learned judge did make an assessment of the witnesses. It has often been said that as an appellate court g our role is a limited one. The limits within which we are required to act are so well set out in *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 35 at p. 36 that we can scarce do better than quote what was said by Lord Shaw in that case:

h When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quiet understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one i set of witnesses, having seen them and heard them, and does not believe

> another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expression, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Since we are unable to detect any appealable error, we must defer to the view of the learned judge on her perception of the evidence before her.

The appellant is not without remedy. We make this comment in response to the arguments before us that the learned judge ignored the current mental status of the appellant. It was her finding that the appellant was psychologically unfit to look after the children. Based on those passages in the evidence drawn to our attention by both counsel we are satisfied that the judge took into account the appellant's current status when she evaluated the respective witnesses.

As we have said, the appellant is not without remedy in respect of her current status. There are other courses open to her. However, we find ourselves unable to exercise our appellate powers to intervene in this appeal.

There is one other matter that we need to deal with. At the commencement of the appeal, the appellant's counsel moved for admission of further evidence. We rejected this with no order as to costs. In our view, it would be a miscarriage of justice to permit further evidence to be adduced. The case in the court below was fought on a common ground. That ground was that both sides would rely on evidence emerging from the cross-examination of the experts. To have permitted the further evidence in question would have occasioned an injustice to the respondent as he would have to fight a new case altogether. And one upon which we would have singularly lacked the views of the trial judge.

Having come to the conclusion that this appeal has no merits, we must dismiss it. By consent, there will be no order as to costs. The deposit is to be refunded to the appellant.